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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-623

KENTUCKY CARBON CORPORATION and BITUMINOUS COAL OPERATORS' ASSOCIATION, *Petitioners,*

v.

INTERIOR BOARD OF MINE OPERATIONS APPEALS and FRANKLIN PHILLIPS, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Petitioners, Kentucky Carbon Corporation and Bituminous Coal Operators' Association, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered in this proceeding on June 20, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is attached hereto in its entirety as Appendix A. The opinion of the Interior Board of Mine Operations Appeals, 2 IBMA 5 (1973), is attached hereto in its entirety as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on June 20, 1974. A timely petition for rehearing with argument was denied on August 26, 1974, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a mine employee's safety complaints to fellow employees brings him within the protection of Section 110(b)(1) of the Act which prohibits the discharge of or discrimination against any miner who has notified the Secretary of the Interior or the Secretary's authorized representative of any alleged violation or danger.

STATUTORY PROVISION INVOLVED

Section 110(b)(1) of the Federal Coal Mine Health and Safety Act (hereinafter the "Act"), 30 U.S.C. § 820(b)(1), provides:

> "No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, insti-

tuted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act."

STATEMENT OF THE CASE

This action was brought by the Respondent Phillips against the Petitioner Kentucky Carbon Corporation (hereinafter "the Company"), before the Secretary of the Interior under Section 110(b)(1)(A) of the Act [30 U.S.C. § 820(b)(1)(A)]. The Respondent was seeking reinstatement, back pay and other damages contending he was discharged in violation of Section 110(b)(1)(A) of the Act which prohibits the discharge of or discrimination against a miner for notifying "the Secretary or his authorized representative of any alleged violation or danger...."

The Respondent was a shuttle car operator at a coal mine operated by the Company in Phelps, Kentucky. It was Respondent's duty to receive coal from a mechanized loader working at the face of the mine and transport that coal by shuttle car to a conveyor belt. The loader was equipped with water sprays to wet down the coal and reduce dust.

While on duty, Respondent refused to continue his work because, in his opinion, the water sprays on the loader were not working properly. The section foreman disagreed with Respondent's opinion and directed him to resume work. When Respondent refused to resume work, the section foreman discharged him.[1]

---

[1] Respondent was thereafter given a written discharge slip informing him that he had been discharged "[F]or interfering with the operation of the mine and abridging the rights of management. Also refusing to obey a direct and proper order."

The Respondent is a member of the United Mine Workers of America, the bargaining representative of the miners employed at the mine. The contract between the Union and the Company provides for a detailed grievance procedure, culminating in binding arbitration. A grievance was filed on behalf of the Respondent alleging that he had been wrongfully discharged. After an unsuccessful attempt to resolve the matter in the grievance procedure, the dispute was referred to an umpire for final and binding decision.

After hearing testimony for both the Company and Union witnesses, the umpire rendered his final and binding decision, denying Respondent's grievance. The umpire held, in pertinent part:

> "Under the Management of Mines clause of the contract the management of the mine, the direction of the working force, is vested exclusively in the operator. The only justifiable reason a miner would have to refuse to obey a direct order to continue to perform his normal duties, is that such an order would put him in danger of immediate personal injury or danger to his life. Such danger did not exist in this case.
>
> "The grievant in this case was not working continuously near the face of the coal where he complained of excessive dust. The only time he was there was when he was waiting to have his buggy loaded or his buggy was actually being loaded. The men who were working on the equipment at the face of the coal were there continuously during their shift. They continued on with their work and did not walk off the job. There is no showing in this case that the grievant was in any immediate danger of great physical harm or danger to his life by continuing to carry out his duties as the other employees of this section continued to do.
>
> "It has in all cases known to this umpire been held that failure to carry out an order to perform

duties assigned to a miner is a violation of the Management of Mines provision of the contract. If each miner can decide under what conditions he would work then the Management of Mine clause of the contract would have no meaning and management would have no control of the operation of the mines and the result would be chaos.

* * *

"In this case the grievant admits that he refused to work and obey a direct order of management to perform his duties and there is no showing he was in immediate danger of serious injury or loss of life. As unpleasant as it is the umpire must find that the management had the right under such circumstances to discharge the employee."

The Respondent then complained to the National Labor Relations Board that his discharge was discriminatory. On December 17, 1971, the Regional Director refused to issue a complaint against the Company. The Regional Director wrote:

"The investigation has disclosed that there were no employees, other than Franklin Phillips [Respondent], who had complained to their supervisor about the dust conditions in the mine on the date in question. Furthermore, the then current collective bargaining agreement contained an implied no-strike clause provision in the clause which provided for arbitration of disputes. Therefore, under these circumstances it was deemed appropriate that Phillips was obligated to arbitrate his grievance and could not legally go on strike, unless there were abnormal working conditions in the mine on the date in question. Moreover, it has been concluded that the instant factual situation does not satisfy the requirements of 'abnormal working conditions' as defined by the Board in *Red Wing Carriers, Inc.*, 130 NLRB 1208."

The Respondent could have appealed this refusal to issue a complaint to the NLRB General Counsel in Washington, D. C., but apparently did not do so.

The Respondent next instituted this proceeding against the Company before the Secretary of the Interior, contending that his discharge was in violation of Section 110(b)(1)(A) of the Act [30 U.S.C. § 820(b)(1)(A)] which provides:

> "No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner . . . by reason of the fact that such miner . . . (A) has notified the Secretary or his authorized representative of any alleged violation or danger . . . ."

There is no evidence in the record that the Respondent or any representative of his notified either the Secretary of the Department of the Interior of any of the Secretary's authorized representatives of any danger or safety violation in the mine. Notwithstanding these facts, the Hearing Examiner (now Administrative Law Judge) held that the Company had, by its discharge of the Respondent, violated the statute because he had made certain complaints to the mine safety committee.

The Interior Board of Mine Operations Appeals reversed the Hearing Examiner, holding that there was no substantial evidence in the record to justify the Examiner's finding that the Company discharged the Respondent for complaining about safety to the mine safety committee. On the contrary, the Board found the preponderance of the evidence established that "the reason for the discharge to be the refusal of Phillips to obey the direct order of the foreman to haul coal."

Furthermore, the Board held that since Respondent's only complaints had been to his foreman or members

of the mine safety committee, not to the Secretary or his authorized representative, there could not be, in any event, a violation of § 110(b)(1)(A) of the Act. The Board did not accept the Hearing Examiner's view that it was sufficient for the Respondent to have notified the mine safety committee of certain safety conditions not related to the issue over which he ceased work—the water sprays.

The decision of the Board was the final decision of the Secretary of the Interior. The Respondent sought review of the Board's decision in the Court of Appeals for the District of Columbia. Jurisdiction of the Court of Appeals was invoked under Section 106(a) of the Act [30 U.S.C. § 816(a)], which provides for judicial review of a final decision of the Secretary of the Interior.

The Court of Appeals for the District of Columbia, in a two to one decision, reversed the decision of the Board holding that the effective cause of the Respondent's discharge was his complaint about hazardous working conditions (Appendix A, p. 18a), that a miner brings himself under the coverage of the Act by reporting safety violations to his foreman and mine safety committee and that a miner need not notify the Secretary of the Interior or his authorized representative before he is protected under the Act (Appendix A, p. 13a). Judge Robb, in dissenting opinion, stated that the majority opinion overrides a clear and unambiguous statutory provision and, by violating the standard of judicial review commanded by Section 106(b) of the Act, substituted a broader protection which the majority believed miners should have but which was not provided by Congress in the Act.

REASONS FOR GRANTING THE WRIT

1. This Case Involves an Important Issue of First Impression Under the Federal Coal Mine Health and Safety Act Which Issue Affects Thousands of Persons in the Coal Industry as Well as Persons in Other Industries.

This case involves an important issue of first impression as to the construction of a major provision of the Federal Coal Mine Health and Safety Act and the role which Congress intended Section 110(b) to play within the overall framework of a delicately drawn national labor policy.[2] The importance of the issues here is not unlike that of the issues presented in *Gateway Coal Co.* v. *United Mine Workers*, — U.S. —, 94 S. Ct. 629 (1974) and has a direct impact upon the contractual procedures of the parties for resolution of safety disputes and other disputes over terms and conditions of employment, the contractual and statutory rights of coal mine operators and other employees to manage their business and direct their work force, and the contractual and statutory procedures for the protection of certain activities of coal miners and other employees.

Affected by the decision below are the rights and obligations of not only the more than 140,000 coal miners and the operators of some 2,000 bituminous and anthracite coal mines in this country, but also the rights and obligations of every employee and employer subject to similar antidiscrimination provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, the Na-

[2] E.g. the Conference Committee in its report stated:

> "Nothing in this Section [110] is intended to interfere with or preempt any collective bargaining agreement."

Legislative History of the Coal Mine Health and Safety Act, p. 1035 (Committee Print, 1970).

tional Labor Relations Act, 29 U.S.C. § 141 *et seq.* and the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* In addition, a major legislative proposal (S. 2117) is pending which would extend the protection of the antidiscrimination provision of the Occupational Safety and Health Act to the more than 200,000 miners now employed in over 10,000 metal and non-metallic mines in this country.

2. The Construction of § 110(b)(1)(A) of the Act by the Court of Appeals Is Inconsistent with the Construction Given by the Administrative Agency Charged with the Enforcement of Such Provision and Is Clearly Wrong.

Viewed in its narrowest sense, the majority opinion of the Court of Appeals concludes that an authorized representative of the Secretary of the Interior, for purposes of § 110(b)(1)(A) of the Act, need not be a coal mine inspector or other representative of the Department of the Interior. Remarkably, the majority holds that an "authorized representative" may be a fellow employee at the mine. This view flows from a strained, if not contorted, reading of statutory language that has always been regarded as clear on its face, and is inconsistent with existing administrative interpretation.[3]

The plain language of the statutory provision requires that notice be given "to the Secretary or his authorized representative . . ". It is uncontested on the record that no such notice on any alleged safety violation was ever given to the Secretary, to a mine inspector, or any other agent of the Secretary.

The legislative history supports the Board's decision below. Senator Edward Kennedy, who sponsored

[3] See Appendix A; Appendix B; and *Munsen, et al.* v. *Smitty Baker Coal Company, Inc.*, 1 IBMA 144 (1972).

§ 110(b) as an amendment on the Senate floor, explained that:

> "My proposed amendment would make it unlawful for any person to discharge or otherwise discriminate against a miner for bringing suspected violations of this act to the attention of *authorities.*" (Emphasis supplied). 115 Cong. Rec. 27948, 91st Cong., 1st Sess. (October 1, 1969).

"Authorities," of course, would in this context be the governmental agency, the Department of Interior, entrusted by Congress with the enforcement of the Act, not private individuals who had been appointed to a mine safety committee by the Union.

The Senator went on to liken his amendment to § 8(a)(4) of the National Labor Relations Act. *Ibid.* But § 8(a)(4) does not apply unless the employee was discriminated against while he was assisting the Board in its investigative and or prosecutorial functions. Thus, it has been held not a violation for an employer to discharge an employee because he "threatened" to, but did not go to the National Labor Relations Board. *Hoover Design Corp.* v. *NLRB*, 402 F.2d 987 (6th Cir., 1968). This Court's recent decision in *NLRB* v. *Scrivener*, 405 U.S. 117 (1972) merely emphasizes this point, as that case involved communication by an employee to an NLRB investigator concerning a pending charge.

Hence, since the purpose of statutory prohibitions like § 110(b) is to protect the integrity of the agency's investigative procedures once they are formally invoked, it is patently a rewriting of the statute to extend § 110(b) to a point in time when the agency has not even been contacted.

The argument that a complaint to the safety committee is but the first step leading to the Secretary or his representative, and should be similarly protected is not only legally unsound but factually untrue as can be seen from this very proceeding where Respondent's prior complaints and those of others were adjusted, and never carried beyond Union representatives. Had Congress desired to bring within the statutory prohibition all safety complaints, to whomever made, it would have been easy to do so. It must be presumed that the omission was intentional.

The opinion of the majority of the Court in this case, like the majority of the Court of Appeals in *Gateway Coal Company* v. *United Mine Workers*, 466 F.2d 1157 (3d Cir., 1972), *rev'd*, 38 L.Ed.2d 583, 94 S. Ct. 629 (1974), conceived of the problem of industrial safety as *sui generis* in the context of industrial relations and, hence, warranting the development of new labor concepts more suitable to supposedly unique circumstances. In so doing, the majority broadened the scope of the Act well beyond the well-defined parameters of the statute and the unambiguous intent of Congress.

The construction of the statutory provision in question by the Court of Appeals ignores the teachings of *Gateway* regarding the impact of the national labor policy on safety disputes, confuses contractual procedures for resolution of safety disputes with statutory prerequisites for employee discrimination claims, fails to consider the discriminatory effect of its decision on those thousands of coal miners who are not employed under any labor agreement at all, let alone one with a grievance procedure for safety disputes, and denigrates

the effectiveness of other statutory remedies available to coal miners engaged in concerted or individual activities of a protected nature.

The effect of the majority opinion is to transform a narrow statutory provision whose purpose is to protect the investigatory procedures of the Secretary of the Interior into one of unlimited dimensions, whose single purpose would be the review of arbitration decisions in safety disputes, the finality and conclusiveness of which were previously agreed upon by labor and management under prior and existing labor contracts. The probable consequence of the majority opinion is that a coal miner, believing that an unsafe condition exists, and without any attempt to gain authorization from his foreman for such action, will proceed to attempt on his own authority to correct a condition on a piece of equipment for which he has no responsibility. Such a conclusion is not necessary for the protection of the miner in this or any other similar situation. The labor agreement for the coal industry makes provision for the coal miner to call in an employee mine safety committee to inspect a condition. Such a committee has the contractual right to declare an imminent hazard and cause the coal miner or miners to be removed from an allegedly hazardous area. The Respondent failed to follow this procedure which provides all the protection he needs, but instead, chose to take matters into his own hands. To sanction this kind of conduct could only lead to a complete breakdown in discipline and management and to utter chaos in the nation's coal mines.

The decision of the majority is clearly wrong. Nowhere in the statute or its legislative history is there

authority for holding that a safety complaint made to a fellow employee satisfies the statutory requirement of a complaint to an "authorized representative" of the Secretary of the Interior. This construction clearly is contrary to the plain language of the statute, the administrative interpretations of that language and legislative history reflecting a more restrictive view and frustrates contractual procedures agreed upon by the union and mine management to resolve disputes.

3. The Circuit Court of Appeals Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as To Call for an Exercise of This Court's Power of Supervision.

The majority opinion of the Court of Appeals calls for an exercise of this Court's power of supervision because such opinion is a clear departure from the express requirement in § 106(b) of the Act [30 U.S.C. § 816(b)] which prescribes the scope of judicial review, that being review of the final decision of the Secretary of the Department of the Interior to determine whether such decision is supported by substantial evidence in the record considered as a whole. The Court of Appeals is not permitted to review the case *de novo* or to make findings of fact unless the findings of the Board are clearly not supported by substantial evidence.

The final decision of the Secretary of the Interior was expressed by the Interior Board of Mine Operations Appeals. The Board concluded that the Respondent was discharged because of his refusal to obey a direct order from his foreman, a reason which is not covered by § 110(b)(1) of the Act. Accordingly, the Board concluded that the Respondent was not entitled to any relief under the Act. The majority opinion of the Court of Appeals does not say that this conclusion

by the Board is unsupported by substantial evidence but clouds the question of substantial evidence by digressing to point out that the substantial evidence question was no question at all. The majority opinion concludes independently that Respondent's discharge was covered under the Act because he would not have made safety complaints but for the Act and because the mine had established reporting procedures for safety complaints which begin with the foreman, a report to the foreman is a report to the "Secretary or his authorized representative." These findings are immaterial to the basic question in the case and were made even after the majority admitted that the Bureau of Mines is the representative of the Secretary of the Interior. However, the majority stated that the procedures put into effect by the union and mine management "bridge the gap" between the miner and the representative of the Secretary.

The Respondent could be granted relief in this case only if he was discharged for reporting to the Secretary or his representative. Therefore, the basic question in the case is "what was the reason for the discharge of the Respondent", i.e., was he discharged for reporting to the Secretary. The Board concluded that the Respondent was discharged because of his refusal to obey a direct order from his foreman. It did not and could not have found that he was discharged for reporting to the Secretary because there is not one word of evidence that he so reported. No other reason is material. The majority of the Court does not say that the Board's conclusion is not supported by substantial evidence but repeatedly refers to findings by the Hearing Examiner (which were not findings of the

Board and were in fact rejected by the Board as not being supported by substantial evidence), selectively credits testimony and ultimately reverses the decision of the Board without meeting head on the question of whether the Board's decision was supported by substantial evidence. It is elementary that this is a departure from the scope of judicial review commanded by § 106(b) of the Act and as such, warrants supervision and reversal by this Court.

However, the majority of the Court even went further in its holding by suggesting that the union and mine management can "bridge the gap" that was left in the Act by Congress. This suggests that private parties can amend an act of Congress by private agreement which is clearly a departure from even the most basic hornbook law. As Judge Robb correctly noted in his dissent,[4] "the gap can be closed only by an act of Congress. The statute cannot be amended by a collective bargaining agreement."

CONCLUSION

This case involves an important issue which affects thousands of persons in the coal industry a well as other industries. The majority decision of the Court of Appeals is a shocking instance of a divided appellate court brazenly substituting a philosophical concept for a clear congressional mandate by devious contortion of language. For the reasons expressed hereinabove, a writ of certiorari should issue to review the judgment

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[4] See Appendix A, p. 33a.

and opinion of the Court of Appeals for the District of Columbia.

Respectfully submitted,

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November 20, 1974

APPENDIX

APPENDIX A

NOTE: The Synopsis prepared by the Reporter is printed herewith, preceding the opinion, as a convenience for readers, and is not part of the opinion.

Notice: The opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1260

FRANKLIN PHILLIPS, PETITIONER

v.

INTERIOR BOARD OF MINE OPERATIONS APPEALS, RESPONDENT

BITUMINOUS COAL OPERATORS' ASSOCIATION, KENTUCKY CARBON CORPORATION, INTERVENORS

Decided 20 June 1974

Proceeding to review decision of the Interior Board of Mine Operations Appeals which found, contrary to decision of Administrative Law Judge, that coal miner was discharged for refusal to obey foreman's order to haul coal rather than because of miner's complaints to the mine safety committee. The Court of Appeals, Wilkey, Circuit Judge, held that a coal miner brings himself within the coverage of the Mine Safety Act by reporting safety violations to his foreman and mine safety com-

mittee; that it is not necessary to formally notify the Secretary of Interior or his authorized representative before he is protected; that miner's discharge was the result of his disagreement with his foreman on safety of coal dust level; that the disagreement was not sufficient alone to bring the Safety Act into play but the firing of the miner without giving him an opportunity to take the complaint to the next stage of review brought the Safety Act into play; and that miners are protected against discrimination because of exercise of rights under the Safety Act.

Reversed with directions.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1260

FRANKLIN PHILLIPS, PETITIONER

v.

INTERIOR BOARD OF MINE OPERATIONS APPEALS, RESPONDENT

BITUMINOUS COAL OPERATORS' ASSOCIATION, KENTUCKY CARBON CORPORATION, INTERVENORS

Petition for Review of an Order of the Interior Board of Mine Operations Appeals

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Decided 20 June 1974

Joseph W. Justice was on the brief for petitioner.

Irving Jaffe, Acting Assistant Attorney General, *Harold H. Titus, Jr.*, United States Attorney at the time the brief was filed, *Walter H. Fleischer*, and *Karen K. Siegel*, Attorneys, Department of Justice, were on the brief for respondent.

Guy Farmer was on the brief for intervenor, Bituminous Coal Operators' Association. *Lynn D. Poole* entered an appearance for intervenor.

Robert G. Kelly and *Charles Q. Gage* were on the brief for intervenor, Kentucky Carbon Corporation.

Before: HASTIE,* *United States Senior Circuit Judge*, ROBB and WILKEY, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* Wilkey.

Dissenting opinion filed by *Circuit Judge* Robb.

WILKEY, *Circuit Judge*: In this case the court is called upon to determine whether the discharge of coal miner Phillips, petitioner, was violative of the Federal Coal Mine Health and Safety Act of 1969 [1] [hereinafter Safety Act]. We find that Phillips brought himself within the penumbra of the Safety Act by notifying his foreman of defective equipment creating dangerous working conditions. Such safety violations, followed by worker notification to management and an ensuing disagreement, are not to be equated with a simple labor dispute; safety violations bring section 110(b)(1) of the Safety Act [2] into operation. We reverse the decision of the Board and reinstate the decision of the Administrative Law Judge.

I. THE DISCHARGE OF PETITIONER PHILLIPS

Franklin Phillips was employed for two years by the Kentucky Carbon Corporation [Kencar] at its Kencar No. 1 Mine in Phelps, Kentucky. During the last four months of his employment he worked as a shuttle car operator, *i.e.*, he received coal from a mechanized loader,

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] 83 Stat. 742, 30 U.S.C. § 801 *et seq.* (1970).

[2] 30 U.S.C. § 820(b)(1).

transported it to a belt conveyer, and there unloaded it into a Roscoe which fed the coal to the belt. On 28 April 1971 Phillips was discharged orally by his foreman because of his failure to comply with an order to return to work, despite his belief that the working conditions were dangerous. Two days later a written discharge slip from Kencar topside management was presented to Phillips.[3]

For several months prior to the discharge Phillips and other employees had raised complaints with their foreman, H. E. Edwards, concerning health and safety aspects of their work area.[4] Complaints centered on excessive coal dust and defective electrical wiring, serious problems of both health and safety underground. After the foreman failed to resolve satisfactorily these problems, complaints were taken to the members of the Mine Safety Committee. The Committee, which is provided for in the collective bargaining agreement, consists of elected representatives of the miners, who are authorized to investigate safety and health conditions and who may close an area of a mine if imminent danger to the men is threatened. The Committee was often able to insure that dangerous conditions were properly dealt with by the foreman, but several uncorrected conditions were reported to the Union District Safety Coordinator.[5]

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[3] The discharge slip stated that he was fired "For interfering with the operation of the mine and abridging the rights of management. Also refusing to obey a direct and proper order." Further, the slip said that "In addition you have received 3 disciplinary action slips since 1969—two for irregular work, and one for unsatisfactory work."

[4] *See* Decision of Hearing Examiner (Administrative Law Judge) ¶ 8, in Appendix for Petitioner [hereinafter App.] at 15.

[5] *See ibid.* The Union District Safety Coordinator has the duty of coordinating resolution of safety complaints be-

In January 1971 a spot inspection of the mine was made by a federal safety inspector.[6] He required the shutting down of a section of the mine in which Phillips worked because of loose coal and coal dust, and improper splicing on electrical equipment.[7] Corrections of these safety violations were undertaken, and the mine was reopened on the same date. However, a Federal Bureau of Mines Notice of Violation charged Kencar with excessive respirable coal dust between 18 March and 1 April 1971.

Both before and after the federal orders Phillips personally lodged complaints concerning excessive coal dust and improper wiring with the foreman and with the Mine Safety Committee.[8] His reports to the foreman were found by the Administrative Law Judge below to anger the foreman, to the point of his throwing objects to the ground and declaring that Phillips was a troublemaker.[9]

One method of reducing coal dust used in the mine involved water sprays on the loader: water would be sprayed to wet down the coal and coal dust as the coal was poured into shuttle cars. The Administrative Law Judge found that while Phillips was employed as a shuttle car operator the sprays often were clogged and thus defective, requiring frequent cleaning.[10]

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tween miners and mine operators, federal inspectors, and state inspectors.

[6] The record does not indicate the impetus behind this particular inspection. *See id.* ¶ 10, in App. at 16.

[7] *Id.* ¶ 9, in App. at 15-16.

[8] *Id.* ¶¶ 15, 16, in App. at 17.

[9] *Id.* ¶ 19, in App. at 19. We assume Phillips was a troublemaker for Kencar; the question is whether such troublemaking was justified legally.

[10] *Id.* ¶¶ 19, 20, 21, in App. at 19.

On the day of the discharge Phillips reported to the foreman that the water sprays were not operating properly. After indicating that he would investigate the matter, the foreman left that section of the mine. The men found that the dust became too thick while working, and the loader operator Ermil Justice asked Phillips to help him clean out the sprays. When the foreman returned, according to Phillips, this exchange occurred:

> [T]he foreman come over while we were working on it and asked what was the matter. I told him we were trying to unstop the water and get water pressure on the loader. He said he was tired of that damned water situation and he was getting tired of it, he was going to put a stop to it one way or another. I said, "I worked in the dust a long time and I can't get nothing done about and I'm not going to work in it." He said, "If you don't want to work in it, I'll just take you outside." And I said, "No, I'll go on my own. You're not taking me anywhere. I'll go on my own." He said, "As far as I'm concerned, you're fired." And I said, "Suit yourself, I'll just go right on outside like you told me." [11]

Phillips then left the mine, and on 30 April a written discharge was received by him.[12]

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[11] Addendum to Brief of Respondent at 4a-5a [hereinafter Add.].

[12] The opinion expressed by the NLRB Regional Director in a letter, relied on by our dissenting colleague, ". . . that there were no employees, other than Franklin Phillips, who had complained to their supervisor about the dust conditions in the mine on the date in question," is irrelevant and obscures the relevant facts. The shuttle car operator, Phillips, and the loader operator, Justice, were the two in position to know whether the spray was operating properly, before the other men would necessarily be aware of the resulting increase in dust. The spray was *not* operating properly and it was the loader operator Justice who in this instance initiated the work stoppage to clean the spray.

Significantly, the loader operator Ermil Justice was not discharged, nor does he seem to have been disciplined for his

This version of the events was accepted by the Administrative Law Judge as a correct account of what happened. It should be noted, however, that the foreman's testimony conflicted with Phillips'.[13]

It appears that Phillips then spoke with his Union, the United Mine Workers, for the Union filed a grievance under the National Bituminous Coal Wage Agreement of 1968 on 6 May 1971 with the Union-Corporation Joint Board of Arbitration. The Union charged that Phillips was wrongfully discharged "while helping the loader operator clean out water sprays on the loader to prevent a dust hazard at the request of the loader operator."[14] The

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participation in cleaning the water sprays. The obvious inference is that Phillips was singled out because of his previous safety complaints, none of which were shown to be unjustified.

[13] The foreman's testimony was as follows:

> When I went to the loader, I asked Ermil Justice, the loader operator, "What was the trouble," and he said Franklin Phillips said he didn't have enough water. So I told him to turn it on, to turn the water on and let me see it, to see how much water pressure he had.
>
> I asked Franklin Phillips, I saw the water was good water and I asked Franklin Phillips to get on his buggy and he told me he wasn't going to haul no coal.
>
> Q: Did he give a reason?
>
> A: Not the first time, I don't think he did. And I asked him again. I told him, "Get on your buggy and haul coal," and he didn't give me a reason then. So I asked him a third time and he said he wasn't going to haul no coal and that's when I fired him for refusing.
>
> Q: Did you determine at that time whether these men had poor water pressure before they took the sprays off?
>
> A: No. I observed the water earlier in the shift and it was good water.

Add. at 17a-18a.

[14] *See* App. at 22.

Arbitration Board referred the matter to an umpire for final decision. On 29 June 1971 he determined that the Union grievance should be denied, since evidence established that Phillips had refused to haul coal when ordered to do so by the foreman, and the Union had not shown such hazards as would justify refusal. However, the umpire also stated that he had "no authority to interpret or enforce the regulations of the Federal Health and Safety Act," and declined to rule on Phillips' asserted rights under the Safety Act.[15]

Phillips then sought aid from the National Labor Relations Board in the form of a complaint against Kencar. This was refused by the Regional Director on 17 December 1971 on the ground that arbitration was required

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[15] *Ibid.* The arbitration agreement and proceeding do not preclude the court from taking jurisdiction of the Mine Safety Act question. The recent Supreme Court decision in *Gateway Coal Co.* v. *United Mine Workers*, 42 U.S.L.W. 4095 (U.S. 8 January 1974), is not to the contrary. Phillips had begun the mine safety complaint process by notifying his foreman of the possibility of a dangerous condition, and was then fired by the foreman. This is very different from the situation in *Gateway Coal*, where the union struck to protest the alleged safety hazard created by retention of foremen who had falsified safety records. Furthermore, the arbitrator here specifically denied that he had authority to consider the Safety Act. Thus, if the court does not interpret and enforce the Act, the Act will lose any effectiveness whatever.

Our interpretation of the relationship between arbitration and the Mine Safety Act is quite similar to the Supreme Court's analysis in an employment discrimination case, *Alexander* v. *Gardner-Denver Co.*, 42 U.S.L.W. 4214 (U.S. 19 February 1974). There Justice Powell, writing for a unanimous Court, held that an employee's right to a trial de novo under Title VII of the Civil Rights Act of 1964 (concerning his discriminatory discharge) was not precluded by previous submission of the grievance to final arbitration under the collective bargaining agreement.

before "striking," unless there were abnormal working conditions, which were not in fact present in this case.[16]

Up to this point, Phillips' efforts through both his Union and the NLRB had been unavailing, and it is important to note why. The Union grievance Arbitration Board umpire declined to rule on Phillips' rights under the Safety Act, which are the rights now involved here. The NLRB Regional Director appeared to be completely confused as to what rights Phillips was asserting, the Director's rationale referring strangely to a collective bargaining agreement with a "no strike clause," that Phillips "could not legally go on strike," and that he "was obligated to arbitrate his grievance." This rather ignored the obvious fact that far from trying to go on strike, all Phillips wanted was his job back, and that he had tried arbitration, with the result that the umpire declined to rule on the one statute which could help him.

What this adds up to for us, as at this point it apparently did for Phillips, is that if there is no right of action under the Mine Safety Act independent of the usual labor dispute settlement mechanisms, there is no right of action under the Mine Safety Act at all. So, after this legal education at some cost in time and money, Phillips applied to the Secretary of Interior for review of his discharge under the Safety Act. After a hearing the Administrative Law Judge ruled on 8 June 1972 that the discharge violated section 110(b)(1) of the Coal Mine Health and Safety Act.[17] The Administrative Law Judge

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[16] *See* Brief of Intervenor, Bituminous Coal Operators' Association, at 4. No appeal was taken from the Regional Director's decision.

[17] 30 U.S.C. § 820(b)(1) mandates that

> No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or repre-

found that the mine foreman had reasonable grounds to know that Phillips had made repeated complaints both to the foreman himself and the Mine Safety Committee regarding electrical and coal dust violations. The ALJ credited Phillips' testimony as being more reliable than the foreman's; in particular he found that the foreman did not check the water sprays before discharging Phillips.[18]

From the evidence as a whole, the ALJ concluded that the discharge of Phillips was

> arbitrary and discriminatory against [Phillips] because of his activities in complaining to the foreman and the Mine Safety Committee about safety and health conditions and because of [Phillips'] safety activities in assisting other miners in corrective maintenance to prevent exposure to excessive and hazardous coal dust.[19]

And he further concluded

> that the motivating factor in the discharge of [Phillips] was an intent to penalize him for such safety complaints and safety activities, and to set an example for other employees not to complain of safety and health conditions or interrupt production by making necessary safety adjustments and repairs.[20]

On appeal the Interior Board of Mine Operations Appeals reversed the Administrative Law Judge. The Board recognized that Phillips had lodged complaints with the

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sentative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

[18] Decision of Administrative Law Judge, in App. at 24 n. 4.

[19] *Id.* ¶ 33, in App. at 21.

[20] *Id.* ¶ 34, in App. at 22.

foreman and the Mine Safety Committee prior to his discharge. However, it also noted that Phillips did not seek any immediate redress upon being fired by the foreman.

The Board found no substantial evidence to support the Administrative Law Judge's findings of a discriminatory discharge.[21] Instead, the Board found that the reason for the discharge was the "refusal of Phillips to obey the direct order of the foreman to haul coal." [22]

Furthermore, the Board found the Administrative Law Judge's construction of the scope of section 110(b)(1) to be erroneous. According to the Board, a discharge motivated by complaints to the Mine Safety Committee would not make a *prima facie* case under the Safety Act, because the scope of protection of the Act is narrow. Complaints must be made to the Secretary or his authorized representative, not to fellow employees, supervisors, or the management of the mine.[23] Since the Board found nothing in the record to show that Phillips had initiated or intended to initiate a report to the Secretary or his authorized representative, Phillips had not succeeded in bringing himself within the protection of the Safety Act.

II. The Proper Scope of the Mine Safety Act

A. *Cause of Discharge Sufficient to Invoke the Act*

The resolution of the issue here depends on the coverage of and the procedure under the Mine Safety Act.

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[21] The Administrative Law Judge's findings are quoted in text at notes 19, 20 *supra*.

[22] Decision of Board, in App. at 37.

[23] *Id.* at 39. This has been the position of the Board in another case which is presently before this court, *Munsey* v. *Morton*, No. 72-2095.

Obviously the Board and the Administrative Law Judge differed in their interpretations. Specifically, we must determine whether a miner brings himself under the coverage of the Act by reporting safety violations to his foreman and Mine Safety Committee, or whether he must formally notify the Secretary of Interior or his authorized representative before he is protected. We believe that the answer is clear: given the mine's procedures regarding safety complaints, the coverage of the Act begins when the miner notifies his foreman and/or safety committeeman of possible safety violations.

It is important to recognize at the outset that this case arises out of the enforcement of the Mine Safety Act, not an ordinary labor dispute. While a simple employee discharge may be merely a labor dispute, when allegations of safety violations are not frivolous the court must carefully review the case to determine whether the Mine Safety Act has been obeyed. Our review indicates that the Act *is* involved here, and indeed we conclude that Phillips has presented a valid cause of action.

Safety costs money. The temptation to minimize compliance with safety regulations and thus shave costs is always present.[24] The miners are both the most interested in health and safety protection, and in the best position to observe the compliance or noncompliance with safety laws. Sporadic federal inspections can never be frequent or thorough enough to insure compliance. Miners who insist on health and safety rules being followed, even at the cost of slowing down production, are not likely to be popular with mine foremen or mine top manage-

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[24] Responsible mine operators who comply with health and safety standards have an obvious interest in seeing uniform standards enforced throughout the industry: competitors who get away with cutting costs by cutting safety are really engaged in unfair competition; the temptation to meet it by engaging in similar tactics is ever-present.

ment. Only if the miners are given a realistically effective channel of communication re health and safety, and protection from reprisal after making complaints, can the Mine Safety Act be effectively enforced.

There is no question but that Phillips felt there was a danger due to excessive coal dust on 28 April 1971. The previous actions of the federal inspectors and the Mine Safety Committee confirm that Phillips was not overly or unreasonably worried about the dangerous conditions in the mine.[25] When Phillips felt that the dust conditions were harmful, he did what he could to reduce the risk—he began to clean the water sprays. It was at this point that the foreman told him to start work, as opposed to continuing to fix the safety equipment. After rejecting Phillips' contention that it was necessary to reduce the dust, the foreman told him either to start work or be fired. Thus Phillips was given the choice of either working in what he felt was an unhealthy, unsafe area, or being discharged for not accepting the foreman's evaluation of the danger. His discharge on 28 April was the direct result of his disagreement with the foreman on the safety of the coal dust level.

We digress here to point out that the "substantial evidence" question is no question at all. Our dissenting colleague adequately describes the Administrative Law Judge's and Board's conclusions on this: "First, the Board found there was no substantial evidence to support the finding of the Trial Examiner that Phillips was discharged because of his safety complaints and safety activities. After reviewing the evidence the Board found, contrary to the Examiner's conclusion, that the reason for the discharge was the refusal of Phillips to obey the direct order of his foreman to haul coal." (P. 9) Of

[25] In the latest of the series, excessive coal dust had been officially found within one month of Phillips' discharge. *See* pp. 3-4 *supra*.

course, both the Administrative Law Judge and the Board were right: Phillips was discharged because of his refusal to obey a direct order to haul coal because in his judgment the working conditions were unsafe and unhealthy and Phillips and his co-worker were engaged in an effort to repair the safety equipment (spray) before resuming hauling coal. The Board never considered any evidence different from the Administrative Law Judge's evidence; the Board simply summed up the evidence in a conclusory way designed to characterize the issue as an ordinary labor dispute—to which ordinary labor dispute remedies would attach. To the court it seems inescapable that the whole dispute arises under the Mine Safety Act and is governed by it; if there had been no Mine Safety Act, it seems likely that Phillips would never have registered this—and previous—safety complaints.

The Mine Safety Act protects miners who are discharged as a result of their complaints concerning safety violations in mines. Section 110(b)(1) prohibits discharge of or discrimination against a miner by reason of the fact that the miner

> (A) has notified the Secretary or his authorized representative of any alleged violation or danger,
>
> (B) has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or
>
> (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.[26]

We believe that Phillips' notification to the foreman of possible dangers is an essential preliminary stage in both the notification to the Secretary (A) and the institution of proceedings (B), and consequently brings the protection of the Safety Act into play.

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[26] 30 U.S.C. § 820(b)(1).

B. *Procedure*

In so holding, we do not adopt either extreme urged upon us. We do not think that merely because a discharge originates in a disagreement between a foreman and a miner that the Mine Safety Act is automatically brought into play. Nor do we adopt the other extreme, take the bare words of the statute with their most limited interpretation, and hold that before a miner's safety complaint is accorded the protection of the Safety Act the coal miner must have instituted a formal proceeding with the Secretary of Interior or his representative. Rather, we look to: the overall remedial purpose of the statute (discussed under C. *infra*); the practicalities of the situation in which government, management, and miner operate; and particularly to the procedure implementing the statute actually in effect at the Kencar mine. The existence of this procedure in itself was a practical recognition that the bare words of the Safety Act, unless implemented by some procedure at the mine to bridge the gap between "the Secretary or his representative" (presumably the Federal Bureau of Mines) and the coal miner himself (the object of the Act), would be completely ineffective in achieving mine safety.

In summary, the procedure at the Kencar mine for the processing of safety complaints was the following:

(1) miner notifies his foreman of the problem and tries to obtain corrective action;

(2) if the foreman disagrees, the miner has the right to call in the Mine Safety Committeeman to evaluate the complaint;

(3) (a) if the Mine Safety Committeeman agrees with the miner and the foreman fails to correct the problem, the Committeeman can bring the case to the entire Committee and they may order the mine section closed;

(3) (b) if the Mine Safety Committeeman disagrees with the miner, the latter can request a Fed-

> eral Mine Inspector be called in. Pending that determination, the miner is to be temporarily reassigned to another area.[27]

This finding of the Administrative Law Judge is not disputed, and could hardly be disputed, as it rests on testimony at the hearing of Kencar management that this procedure was in effect before and on the day Phillips was discharged.

The Administrative Law Judge further found:

> It is conceded by Respondent that, *pending a resolution of a safety or health complaint, a miner* at the Kencar Mine *had the right to refuse to work* under conditions which he believed in good faith to be hazardous to his *safety or health.*[28]

Nothing in the Mine Safety Act or mine procedure suggests that the company has a right to fire a miner for refusing to work in a particular area of a mine when he fears a chronic, long-term threat to his health or safety there due to safety violations.[29]

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[27] *See* Decision of Administrative Law Judge ¶ 6, in App. at 14.

[28] *Ibid.* Emphasis supplied. The actual practice of the mine followed steps (1) and (2) of the theoretical model, but it varied thereafter. If the Mine Safety Committeeman could not get the foreman to take appropriate action, he would either call in a federal inspector or transmit the complaint to the Union District Safety Coordinator, who might later call in a federal inspector. *Id.* ¶ 7, in App. at 14-15. Several times in the months before Phillips' discharge the Union District Safety Coordinator was required to step in and request modifications for safety; the spot federal inspection also unearthed safety defects.

[29] The collective bargaining agreement is inapposite because the umpire here explicitly refused to consider the Mine Safety

The Administrative Law Judge further specifically found:

> Pending a determination by the Federal inspector, the miner was to be reassigned to other, temporary duties. No case experienced in this mine actually reached the stage of temporary reassignment pending a Federal inspection, but management acknowledged at the hearing that under its practices and the *implementation of its bargaining* agreement, such would be the rights of the miners regarding safety or health complaints.
>
> 7. It is evident that, although the above safety complaint rights were acknowledged by management at the hearing, they were not entirely understood by the miners themselves.[30]

It is clear beyond peradventure that Phillips was not required to accept the foreman's evaluation of danger; it is equally clear that he was discharged for not accepting the foreman's safety determination. We reject the Board's suggestion that Phillips was discharged only for a simple refusal to work. Rather, we conclude that the effective cause of Phillips' discharge was his complaint about hazardous working conditions in the mine.

When the foreman told him he was fired, Phillips left the mine. He was undoubtedly unfamiliar with the elaborate appeal and review procedure; he assumed that the firing was final. In view of the discharge on improper grounds,[31] we cannot hold Phillips to the standard of re-

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Act and its coverage of safety threats of a non-immediate nature. *See* p. 7 *supra*. And, there had been not only coal dust but defective wiring violations recently found in this mine (*see* p. 4 *supra*); excessive dust plus defective wiring is an explosive safety hazard; we cannot assume that Phillips' complaint went *only* to a long-term health hazard.

[30] Decision of Administrative Law Judge ¶ 6, in App. at 14.

[31] The discharge slip was quoted in note 3 *supra*. The Administrative Law Judge found that the three disciplinary

quiring him to file a petition with the Mine Safety Committee, or to notify formally the Secretary or other authorized person. Phillips "instituted [a] proceeding" with the closest representative of any authority, *i.e.*, his foreman, by making an effective complaint of a violation of the Mine Safety Act, *i.e.*, refusing to work in unsafe conditions, for which he was promptly fired. While there is a possibility that the foreman also was unaware of the proper safety complaint procedures, nevertheless the mine management should have known of these procedures and rights, and with a greater time for reflection and investigation should have notified the miner of his rights of appeal and quashed the discharge. In fact the management did neither, but sent a formal discharge notice asserting additional grounds, the validity of which the foreman later denied. This ratification by Kencar management of the improper discharge, especially in view of previous safety complaints, violated the Mine Safety Act.

The above discussion of the procedures necessary to implement the Mine Safety Act makes clear our most fundamental disagreement with the decision rationale of the Board, espoused by our dissenting colleague here. The method of "institut[ing] any proceeding" or "notif[ying] the Secretary or his authorized representative" is not spelled out in the Act, certainly not in terms cognizable by a coal miner. The Kencar Mine management and union representatives sensibly recognized this, and put into effect a procedure to bridge the gap between the miner in the pit and the Federal Bureau of Mines, the Secretary's representative. That procedure had as its

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action slips "were not pressed or proved by the Respondent at the hearing. On the contrary, the foreman testified that [Phillips] had been a very good worker—as good as 'any miner in the section.' . . . I find from the evidence as a whole that the above added charges had no bearing upon the foreman's decision to discharge." Decision of Administrative Law Judge ¶ 26, in App. at 20-21.

first step the miner notifying his foreman of the problem and trying to obtain corrective action. Phillips did precisely this in accordance with Kencar Mine's approved procedure to meet the standards of the Mine Safety Act. Phillips was fired for doing so.

To hold that Phillips was not protected against discharge because he took the first prescribed step under the Kencar procedure to invoke the Mine Safety Act, to hold that only a miner's *discharge after* he reaches the Bureau of Mines with his complaint is protected by the Safety Act, would nullify not only the protection against discharge but also the fundamental purpose of the Act to compel safety in the mines.[32]

We believe that the Mine Safety Act, to be effective, must be construed as we have here. If it is not, it will be easy for management to avoid the prohibitions of the Act. If every miner who complained of safety device failures could be placed in Phillips' situation, the Act would be a hollow promise of protection; a foreman's determination of safety would become final.

C. *Legislative History and Judicial Construction*

Our view of the Mine Safety Act is supported by the legislative history. Senator Kennedy, in introducing his

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[32] *See* text at n. 24 *supra*. While previously Phillips had filed safety complaints as an *employee*, after his discharge he apparently assumed this channel was no longer open to him. Of course, to endorse this limited concept of the Safety Act's scope would be to put a premium on the company firing first, before the employee has a chance to institute a proceeding with the Secretary's representative. To hold that *only* a discharge after a formal proceeding has been instituted is protected, but that a discharge after the miner has taken the first step in the complaint procedure by complaining to his foreman is *not* protected, would be to invite all employers to gut the Safety Act by quick discharges of complaining employees. Yet this is where the Board's view, endorsed by the dissent here, would inexorably lead us.

amendment which became section 110(b) of the Safety Act, noted the broad purpose of the provision:

> the rationale for this amendment is clear. For safety's sake, we want to encourage the reporting of suspected violations of health and safety regulations. . . .
>
> But miners will not speak up if they fear retaliation. This amendment should deter such retaliation, and, therefore, encourage miners to bring dangers and suspected violations to public attention.[33]

Senator Kennedy also remarked that

> [i]t is especially important that miners not feel inhibited to point out health and safety violations because there is such a high degree of danger in the mines.[34]

Given this wide scope of protection intended, a liberal construction of the language of the Act is justified.[35]

The House Committee on Education and Labor in reporting on the Act also suggested a liberal construction:

> Subsection (b) prohibits discrimination against miners for having exercised their rights under this Act or for having participated, *in any way*, in the enforcement of the Act. The subsection provides procedures for obtaining reinstatement and back pay for miners discharged by operators and other remedies for miners discriminated against.[36]

Furthermore, we note that the Third Circuit in considering a previous Mine Safety Act stressed a broad reading:

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[33] 115 Cong. Rec. 27948 (1969).

[34] *Ibid.*

[35] Thus we suggest it would be improper narrowly to construe Senator Kennedy's comment that his amendment would prohibit discrimination against miners for bringing violations "to the attention of authorities." *Ibid.*

[36] House Comm. on Education and Labor, 91st Cong., 2d Sess., Legislative History, Federal Coal Mine Health and Safety Act 1122 (1970) (emphasis added).

> [I]n construing safety or remedial legislation narrow or limited construction is to be eschewed. Rather, in this field liberal construction in light of the prime purpose of the legislation is to be employed. This statute is remedial, with a humane purpose in view and is therefore entitled to a liberal construction.[37]

The parallels between the Mine Safety Act and other protective labor acts are significant. The Safety Act provision which we here construe was introduced with the announced intention of giving to miners "the same protection against retaliation which we give employees under other Federal labor laws." [38] Specifically, the National Labor Relations Act, the Fair Labor Standards Act, and the Landrum-Griffin Act were all noted as protecting employees against discrimination because of exercise of rights under the Acts.

The Supreme Court has construed the corresponding NLRA provision broadly: in *NLRB* v. *Scrivener, dba AA Electric Company*,[39] the Court held violative of the NLRA the discharge of an employee for his giving a sworn written statement to a NLRB field examiner who was investigating an unfair labor practice charge. Justice Blackmun, writing for the unanimous Court, was concerned that the employee should be protected in the investigative stages as well as after filing of formal charges or in giving formal testimony. Such protection is necessary " 'to prevent the Board's channels of information from being dried up by employer intimidation of pros-

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[37] *St. Marys Sewer Pipe Co.* v. *Director of U.S. Bureau of Mines*, 262 F.2d 378 (3rd Cir. 1959) (citations omitted).

[38] 115 Cong. Rec. 27948 (1969).

[39] 405 U.S. 117 (1972).

pective complainants and witnesses.'" [40] Furthermore, Justice Blackmun stated that

> the presence of the preceding words "to discharge or otherwise discriminate" reveals, we think, particularly by the word "otherwise," an intent on the part of Congress to afford broad rather than narrow protection to the employee.[41]

In the Mine Safety Act the words "in any other way discriminate" may be similarly construed.

We believe our view of the scope of section 110(b)(1) of the Mine Safety Act is the only practical one to ensure the health and safety of miners, which is the central purpose of the Act. Holding that miners are not protected until they initiate formal procedure for review, of which they may be unaware, would violate the goal of protecting the miners' health and would thus violate the Congressional intent.[42] The result we reach in this case best comports with the remedial purpose of the legislation. Therefore, we reverse the decision of the Interior Board of Mine Operations Appeals and reinstate the decision and order of the Administrative Law Judge.

So ordered.

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[40] *Id.* at 122 *quoting John Hancock Mut. Life. Ins. Co.* v. *NLRB,* 89 U.S.App.D.C. 261, 263, 191 F.2d 483, 485 (1951).

[41] 405 U.S. at 122.

[42] In stating the purpose and goals of the Act, the Congress declared that "the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource—the miner; . . . there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines." 30 U.S.C. § 801(a), (c).

ROBB, *Circuit Judge, dissenting*: I dissent on two counts: (1) in my judgment the majority has misconstrued section 110(b)(1) of the Act; and (2) assuming that the majority rightly construes the Act, it is wrong in overturning the findings of the Board on the facts.

I.

The petitioner Phillips was a shuttle car operator at a coal mine, his duty being to transport coal in his shuttle car from a mechanized loader at the face of the mine to a conveyor belt. The loader was equipped with water sprays to wet down the coal and reduce dust. While on duty Phillips refused to continue his work because in his opinion the water sprays on the loader were not working properly. The foreman disagreed with the petitioner's opinion and directed him to resume work. When Phillips refused to obey the foreman discharged him.

Pursuant to the contract between the petitioner's Union, the United Mine Workers, and the company, the matter of the petitioner's discharge was submitted to binding arbitration. The grievance submitted by the Union on behalf of the petitioner alleged that he had been wrongfully discharged. After hearing testimony from both company and Union witnesses the umpire rendered his final and binding decision. He held, in pertinent part:

> Under the Management of Mines clause of the contract the management of the mine, the direction of the working force, is vested exclusively in the operator. The only justifiable reason a miner would have to refuse to obey a direct order to continue to perform his normal duties, is that such an order would put him in danger of immediate personal injury or danger to his life. Such danger did not exist in this case.
>
> The grievant in this case was not working continuously near the face of the coal where he complained of excessive dust. The only time he was

there was when he was waiting to have his buggy loaded or his buggy was actually being loaded. The men who were working on the equipment at the face of the coal were there continuously during their shift. They continued on with their work and did not walk off the job. There is no showing in this case that the grievant was in any immediate danger of great physical harm or danger to his life by continuing to carry out his duties as the other employees of this section continued to do.

It has in all cases known to this umpire been held that failure to carry out an order to perform duties assigned to a miner is a violation of the Management of Mines provision of the contract. If each miner can decide under what conditions he would work then the Management of Mine clause of the contract would have no meaning and management would have no control of the operation of the mines and the result would be chaos.

* * * *

In this case the grievant admits that he refused to work and obey a direct order of management to perform his duties and there is no showing he was in immediate danger of serious injury or loss of life. As unpleasant as it is the umpire must find that the management had the right under such circumstances to discharge the employee.

Phillips then complained to the National Labor Relations Board that his discharge was discriminatory. On December 17, 1971 the Regional Director refused to issue a complaint against the company. The Regional Director wrote:

The investigation has disclosed that there were no employees, other than Franklin Phillips, who had complained to their supervisor about the dust conditions in the mine on the date in question. Furthermore, the then current collective bargaining agreement contained an implied no-strike clause provision in the clause which provided for arbitration disputes. Therefore, under these circumstances it was deemed appropriate that Phillips was obligated to arbitrate

> his grievance and could not legally go on strike, unless there were abnormal working conditions in the mine on the date in question. Moreover, it has been concluded that the instant factual situation does not satisfy the requirements of "abnormal working conditions" as defined by the Board in *Red Wing Carriers, Inc.*, 130 NLRB 1208.

Phillips next instituted the proceeding which is now before us under section 110(b)(2) of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. § 820 (b)(2).) Seeking reinstatement, back pay and other damages he contended that his discharge was in violation of section 110(b)(1) of the Act which provides:

> (b)(1) No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

After a hearing the Trial Examiner (now called Administrative Law Judge) concluded that the company had violated section 110(b)(1) "by discharging the Applicant . . . because he had notified his Mine Safety Committee of alleged safety violations and dangers in the No. 1 Section of Respondent's mine." The examiner ordered the company to reinstate Phillips, with back pay and the costs and expenses of the proceeding, including attorneys' fees.

The Board of Mine Operations Appeals reversed the Hearing Examiner, holding that there was no substantial evidence in the record to justify the Examiner's conclusion. On the contrary, the Board found the preponder-

ance of the evidence established that the reason for the discharge was

> the refusal of Phillips to obey the direct order of the foreman to haul coal. Although the foreman's action may be looked upon as harsh or extreme, it is not within the province of the Judge or this Board to find that he had no authority to discharge any miner who disobeyed an order to work or otherwise acted in an unreasonable manner. We note that the umpire in the arbitration proceeding concluded, "As unpleasant as it is, the umpire must find that *the management had the right under such circumstances* to discharge the employee" (emphasis added) (Ex. 4(c), p. II). We are concerned here only with the question of whether the discharge was in violation of section 110(b)(1)(A) of the Act. The principal objective of that section is to preserve the integrity of the Act and not to provide a new forum for the litigation of management and labor grievances. [Emphasis in original.]

II.

The majority concludes "that Phillips' notification to the foreman of possible dangers is an essential preliminary stage in both the notification to the Secretary . . . and the institution of proceedings . . . , and consequently brings the protection of the Safety Act into play." In other words the majority says that when Phillips complained to his foreman he "notified the Secretary or his authorized representative" of the alleged violation or danger, within the meaning of section 110(b)(1) of the Act. I cannot accept this construction of the statute.

In the first place it seems to me that the phrase "the Secretary or his authorized representative" on its face plainly does not mean a foreman or the mine employees serving on a safety committee. If Congress had intended the phrase to have such an inclusive meaning, so that any complaint by a miner concerning safety clothed him with the protection of section 110(b)(1), I think Con-

gress would have said so. If the majority opinion were presented to a congressional committee considering amendments to the Act it might persuade the committee that section 110(b)(1) should be broadened to cover all safety complaints no matter to whom they are made; but this court is not a legislative committee.

My conclusion is reinforced when section 110(b)(1) is considered in the context of other sections of the Act. Thus the phrase "the Secretary or his authorized representative" appears elsewhere in the statute; it is not an isolated phrase used only in section 110(b)(1). Section 103(a), 30 U.S.C. § 813(a) requires that "Authorized representatives of the Secretary shall make frequent inspections and investigations in coal mines . . . ." Section 103(b)(1) gives the Secretary "or any authorized representative of the Secretary" a right of entry to any coal mine for the purpose of inspection or investigation. Section 103(e) provides that in the event of an accident in a coal mine where rescue and recovery work is necessary "the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activity in such mine." Section 103(f) empowers "an authorized representative of the Secretary" to issue safety orders in the event of any accident occurring in a coal mine. Section 103(g) provides: "Whenever a representative of the miners has reasonable grounds to believe that a violation of a mandatory health or safety standard exists, or an imminent danger exists, such representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger." Section 103(h) directs that at the commencement of any inspection of a coal mine "by an authorized representative of the Secretary, the authorized representative of the miners at the mine at the time of such in-

spection shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection." Section 104, 30 U.S.C. § 814, deals in detail with the findings to be made and the actions to be taken by "an authorized representative of the Secretary", with respect to dangers or violations of health or safety standards discovered upon an inspection of a coal mine.

From these numerous references to "authorized representative of the Secretary" in the statute it seems plain to me that when Congress used those words in section 110(b)(1) it meant a mine inspector or some other designated agent of the Secretary, and not some committee or other representative of the miners. I think the purpose of section 110(b)(1) is to protect the integrity of the agency's investigative procedure by assuring that a miner who complained to the agency would not be penalized. To hold that the section applies to a miner who had never complained to the agency is I think to distort the statute.

My reading of the Act is confirmed by Senator Kennedy's comments on the floor of the Senate at the time he offered the amendment which ultimately became sections 110(b)(1)-(3). The Senator offered his amendment as an addition or amendment to section 301(h) of the Senate bill. Section 301(h) of the Senate bill became section 103(g) of the statute as enacted. (*See* p. 5 *supra.*) The Kennedy amendment was added to the Senate bill as section 301(h)(2). The Senator said: "My proposed amendment would make it unlawful for any person to discharge or otherwise discriminate against a miner for bringing suspected violations of this act *to the attention of authorities.*" 115 Cong. Rec. 27948. (Emphasis added.) By thus referring to "authorities" and coupling his amendment to those sections of the bill which dealt with inspections by an authorized representative of the Secretary, the Senator made it clear that the authorities he

had in mind were mine inspectors or other designated agents of the Secretary. *See Legislative History of the Federal Coal Mine Health and Safety Act* 540-41 (Comm. Print 1970).

In his remarks on the floor Senator Kennedy noted that his proposed amendment to section 301(h) "gives to miners the same protection against retaliation which we give employees under other Federal labor laws." 115 Cong. Rec. 27948. Among the other Federal labor laws to which the Senator referred was the National Labor Relations Act. That act provides, 29 U.S.C. § 158(a)(4), that it shall be an unfair labor practice "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter." It has been held however that this section does not protect an employee who has not complained to the Board or one of its agents. *Hoover Design Corp. v. NLRB*, 402 F.2d 987 (6th Cir. 1968). *See NLRB v. Scrivener*, 405 U.S. 117, 125 n.6 (1972).

I am puzzled by the majority's suggestion that Phillips came within the protection of section 110(b)(1) because he was "unfamiliar with the elaborate appeal and review procedure" established by the collective bargaining agreement. Neither do I understand the suggestion that the mine management was under a duty to explain matters to Phillips. I think the proper interpretation of the statute should not depend upon whether Phillips understood the collective bargaining grievance procedure. Moreover, I believe it was the function of the Union, which represented Phillips, and not the company, to explain the procedure to him if he was unable to understand it. In any event the record does not establish that Phillips was unfamiliar with the procedure; on the contrary he displayed considerable expertise in that field. He personally took his complaints to the Mine Safety Committee and he testified that he knew about this grievance procedure. (*See* addendum to Gov. Br. pp. 1a-3a.)

III.

The majority concludes that the "bare words of the Safety Act . . . would be completely ineffective" unless "implemented by some procedure at the mine". I think this argument fails when examined in the light of the true scope of section 110(b)(1) and the additional remedies available to a miner who is concerned about his safety in the mine.

A miner who is concerned about conditions in the mine which he considers dangerous is protected by both his collective bargaining agreement and by section 502 of the Labor Management Relations Act, 29 U.S.C. § 143. In this case Phillips asserted his rights under the collective bargaining agreement and lost, because the umpire found that his discharge did not violate the agreement. He then invoked his remedy under section 502 of the Labor Management Relations Act, and lost again, because the Regional Director of the NLRB held that conditions in the mine were not "abnormally dangerous" within the meaning of the statute. *See Gateway Coal Co. v. UMW*, 94 S.Ct. 629 (1974). Thus, before invoking the Mine Safety Act Phillips could and he did seek redress in two other forums, one provided by his contract, the other by statute. He was unsuccessful, not because procedures for redress were unavailable or defective, but because the evidence failed to support his claim.

Although the majority, citing a finding by the Examiner, suggests that Phillips' discharge did violate the collective bargaining agreement (Op. p. 15) this matter is not relevant to the issue before us. We are not reviewing the decision of the umpire. The only issue before us is whether Phillips' complaint to a fellow employee brought him within the protection of section 110(b)(1) of the Mine Safety Act; the question is not whether his discharge violated the collective bargaining agreement. Section 110(b)(1) forbids an employer to discharge a miner because he has notified the Secretary

or his authorized representative of any alleged violation or danger; it is not directed at discharges for refusal to work or discharges in violation of a collective bargaining agreement.

The majority commends the Kencar Mine management and the Union for adopting "a procedure to bridge the gap between the miner in the pit and the Federal Bureau of Mines, the Secretary's representative." The majority then reasons that Phillips was protected against discharge because his complaint to his foreman was "the first prescribed step under the Kencar procedure to invoke the Mine Safety Act". I do not understand how an "authorized representative" of the Secretary can be created, and the scope of the statute expanded, by an agreement between the company and the Union. Assuming that the hiatus perceived by the majority exists—an assumption I think unwarranted, given section 502 of the Labor Management Relations Act—the gap can be closed only by act of Congress. The statute cannot be amended by a collective bargaining agreement.

IV.

The decision of the Board of Mine Operations Appeals rested on two independent grounds. First, the Board found there was no substantial evidence to support the finding of the Trial Examiner that Phillips was discharged because of his safety complaints and safety activities. After reviewing the evidence the Board found, contrary to the Examiner's conclusion, that the reason for the discharge was the refusal of Phillips to obey the direct order of his foreman to haul coal. Second, the Board found that even if the discharge were motivated by Phillips' safety complaints to the foreman and the Mine Safety Committee, as a matter of law this would not bring him within the scope of section 110(b)(1).

Holding that the Board's second independent ground was wrong, the majority is nevertheless bound by the

Act to affirm the decision of the Board if the Board's conclusions of fact are supported by substantial evidence. Section 106(b) of the Act, 30 U.S.C. § 816(b), relating to judicial review of any order or decision issued by the Secretary or the Panel, provides: "The findings of the Secretary or the Panel, if supported by substantial evidence on the record considered as a whole, shall be conclusive."

Instead of examining the Board's findings to determine whether they are supported by substantial evidence, the majority selectively credits testimony, and proceeds to "reject the Board's suggestion that Phillips was discharged only for a simple refusal to work." The majority then finds as a fact "that the effective cause of Phillips' discharge was his complaint about hazardous working conditions in the mine"; and the majority orders Phillips to be reinstated with back pay, costs, expenses and attorney's fees.

In my judgment the majority opinion violates the standard of judicial review commanded by section 106 (b). There was conflicting testimony in the record, but considering all the evidence introduced at the hearing, I cannot say there was no substantial evidence to support the Board's conclusion. Although my colleagues have drawn a different conclusion from the same facts this does not authorize them to upset the Board's findings and substitute their own. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

V.

The impact of this decision on mine operations will be substantial. Even more important and significant, in my opinion, is the determination of my colleagues to override a clear and unambiguous statutory provision and substitute the broader protection which they believe

miners ought to have as a matter of policy. This is an intrusion into the legislative domain in which I cannot join.

I respectfully dissent.

APPENDIX B

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF MINE OPERATIONS APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

FRANKLIN PHILLIPS

v.

KENTUCKY CARBON CORPORATION

IBMA 72-28 Decided January 30, 1973

Appeal from a decision of William Fauver, Administrative Law Judge (formerly Departmental Hearing Examiner), reinstating the employment of a coal miner pursuant to section 110(b) of the Federal Coal Mine Health and Safety Act of 1969.

Reversed.

Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Discharge: Burden of Proof

Proof by a discharged miner that he has notified only a member of the mine safety committee of an alleged violation or danger without showing a notice or instigation thereof to the Secretary or his authorized representative fails to sustain the burden of proving a violation of section 110(b)(1)(A) of the Act.

Federal Coal Mine Health and Safety Act of 1969: Administrative Procedure: Generally

The Board may be persuaded by the findings of fact in an arbitration proceeding where they are made a part of the record, but the Board is not bound or controlled thereby.

APPEARANCES: R. G. Kelly, Esquire, Charles Q. Gage, Esquire, of Jackson, Kelly, Holt, & O'Farrell, attorneys

for Kentucky Carbon Corporation; Joseph W. Justice, Esquire, of Burke & Justice, attorneys for Franklin Phillips; and Guy Farmer, Esquire, attorney for Bituminous Coal Operators' Association, amicus curiae.

OPINION BY THE BOARD

Procedural Background

On May 28, 1971, Franklin Phillips (applicant) filed a Petition for Reinstatement to Employment as a Result of Discriminatory Discharge under section 110(b)(1)(A) of the Federal Coal Mine Health and Safety Act of 1969 (the Act) [1] with the Office of Hearings and Appeals, Arlington, Virginia. On June 22, 1971, Kentucky Carbon Corporation (Kentucky Carbon) filed a Motion to Dismiss and Answer, and on October 15, 1971, filed a Motion for Summary Decision. The Administrative Law Judge, on October 15, 1971, ordered Phillips to amend or to show cause why his application should not be dismissed, to which Phillips responded on November 12, 1971. On November 18, 1971, Kentucky Carbon filed its Statement in Response to Applicant-Petitioner's Response to Order to Show Cause. The Judge denied Kentucky Carbon's Motion to Dismiss and Motion for Summary Decision on November 22, 1971. A hearing was held December 10, 1971, and a decision was issued in favor of Phillips on June 8, 1972. Kentucky Carbon filed a Notice of Appeal with this Board on June 28, 1972, and Bituminous Coal Operators' Association (BCOA) filed a petition on July 18, 1972, to participate as amicus curiae, which was granted by the Board. Timely briefs were filed by the parties, and oral argument before the Board was held August 24, 1972.

Factual Background

Franklin Phillips was a regular employee of Kentucky Carbon Corporation at its Ken-Car No. 1 Mine at Phelps,

[1] P. L. 91-173, 83 Stat. 742-804, 30 U.S.C. §§ 801-960 (1970).

Kentucky. On April 28, 1971, he reported for work on the second shift (4 p.m.) to perform duties as a shuttle car operator[2] in the No. 1 section. Phillips had hauled several loads of coal when it became apparent to him that water sprays on the loading machine were operating inadequately. The loading machine operator, Ermil Justice, also recognized that a problem existed and requested Phillips to get some tools with which the malfunctioning water sprays could be disassembled. The loading machine, which transferred coal from the working faces to the shuttle cars, was provided with water sprays to retard coal dust from "boiling up" as the coal hit the bottom of the shuttle cars. (Tr. 13).[3] Ermil Justice and Phillips removed several water spray heads and were in the process of cleaning them when the section foreman, H. E. Edwards, appeared on the scene. Phillips and the foreman exchanged words relating to the temporary work stoppage and tempers grew short. Edwards ended the conversation by firing Phillips, who then left the mine.

There is some evidence in the record that Edwards had at times displayed to some of the miners a short temper and an intolerance of safety complaints related to the mine's operation. It also appears that Phillips had made various complaints to Edwards and to a union mine safety committee member prior to his discharge.

Phillips did not seek any immediate redress of the incident and two days afterward was given a discharge slip—

---

[2] Shuttle Car Operator: "In bituminous coal mining, one who drives an electrically powered truck (shuttle car) in a coal mine to transport coal from the excavation point to the conveyor belt." *A Dictionary of Mining, Mineral and Related Terms* at 1007 (P. Thrush ed. 1968).

[3] References to pages of the transcript of hearing will be abbreviated as "(Tr. ——)" in this decision. References to exhibits which were accepted as part of the record will be noted as ("Ex. ——)."

"For interfering with the operation of the mine and abridging the rights of management. Also refusing to obey a direct and proper order" (Ex. 1). On May 6, 1971, the United Mine Workers of America (UMWA), on behalf of Phillips, filed a grievance under the applicable arbitration provisions of the National Bituminous Coal Wage Agreement of 1968, alleging that Phillips had been unjustly discharged. The final decision by the umpire on this grievance, dated June 21, 1971, was in favor of management (Kentucky Carbon), and was based in part on Phillips' own admission (Ex. 4(a), p. 65) [4]: "In this case the grievant (Franklin Phillips) admits that he refused to work and obey a direct order of management to perform his duties * * *." (Ex. 4(c), p. 11).

Contentions of the Parties

Kentucky Carbon contends that Phillips failed to prove by a preponderance of the evidence that he was discharged because he had notified the Secretary or his authorized representative of any alleged violation or danger, but in fact was discharged for another reason, i.e., that he refused to work. The strict interpretation of the term "Secretary" as defined in section 3(a) of the Act is urged.

Phillips argues that his complaint to a member of the mine safety committee or to the union safety coordinator of an alleged safety violation is equivalent to a complaint to the Secretary under section 110(b)(1)(A) of the Act and contends that the remedial purposes of the Act require that section 110(b)(1)(A) be given a broad and liberal interpretation. In sum, his case is that he was discriminatorily discharged in violation of section 110 of the Act for having made a report to a mine safety committeeman

[4] Q. 22. "Did you hear the section foreman tell you to get back on your shuttle car and haul coal?

A. "He told me to haul, but I said I wouldn't haul in that dust —it was too dusty."

and that the Judge's decision and findings of fact are supported by substantial evidence.

The points argued by BCOA as amicus curiae are: first, that Phillips made no report to the Secretary or his authorized representative and that the Judge erred by interpreting section 110(b)(1)(A) to mean that an employee's complaint on a safety matter to a member of the local union safety committee is equivalent to making a safety complaint to the Secretary or his authorized representative; and second, that the Judge erred in refusing to find the umpire's ruling controlling where, in an arbitration proceeding instigated by Phillips, his discharge was found to be justified.

Issues Presented on Appeal

I

Did Phillips prove by a preponderance of the evidence that he was discharged for the reason that he had notified the Secretary or his authorized representative of any alleged violation or danger so as to bring his discharge under the protective provisions of section 110(b)(1)(A) of the Act?

II

Is a determination made by an umpire pursuant to a collective bargaining agreement on the matter of a miner's discharge binding upon an Administrative Law Judge or this Board in a proceeding brought under section 110(b) of the Act?

I

It is undisputed that Franklin Phillips was discharged by Kentucky Carbon on April 28, 1971. The Administrative Law Judge made the following Findings of Fact with respect to the reason for the discharge:

> 33. I find from the evidence as a whole that the foreman's discharge of the Applicant was arbitrary

and discriminatory against the Applicant because of his activities in complaining to the foreman and the Mine Safety Committee about safety and health conditions and because of the Applicant's safety activities in assisting other miners in corrective maintenance to prevent exposure to excessive and hazardous coal dust.

34. I find further that the motivating factor in the discharge of the Applicant was an intent to penalize him for such safety complaints and safety activities, and to set an example for other employees not to complain of safety and health conditions or interrupt production by making necessary safety adjustments and repairs.

We find no substantial evidence in the record to support the above two findings. We find instead that the preponderance of the evidence manifested by the testimony of Phillips before the Administrative Law Judge (Tr. 14-15) and before the umpire (Ex. 4(a), p. 65). Ermil Justice (Tr. 31), and H. E. Edwards, the foreman (Tr. 110), and Exhibit 1 establishes the reason for the discharge to be the refusal of Phillips to obey the direct order of the foreman to haul coal. Although the foreman's action may be looked upon as harsh or extreme, it is not within the province of the Judge or this Board to find that he had no authority to discharge any miner who disobeyed an order to work or otherwise acted in an unreasonable manner. We note that the umpire in the arbitration proceeding concluded, "As unpleasant as it is, the umpire must find that *the management had the right under such circumstances* to discharge the employee" (emphasis added) (Ex. 4(c), p. 11). We are concerned here only with the question of whether the discharge was in violation of section 110(b)(1)(A) of the Act. The principal objective of that section is to preserve the integrity of the Act and not to provide a new forum for the litigation of management and labor grievances.

Included among the Administrative Law Judge's Conclusions of Law were the following:

> 3. An employer's discrimination against a coal miner because the miner has notified his Mine Safety Committee (or one of its members of an alleged safety violation or danger at the mine is a violation of Section 110(b)(1)(A) of the Act.
>
> 4. Respondent violated Section 110(b)(1)(A) of the Act by discharging the Applicant on April 28, 1971, because he had notified his Mine Safety Committee of alleged safety violations and dangers in the No. 1 Section of Respondent's mine.

We hold these two Conclusions of Law to be an erroneous construction of the Act for reasons set forth herein.

In this appeal, Phillips contends that his frequent safety complaints to foreman Edwards and occasionally to members of the mine safety committee motivated his discharge. Assuming *arguendo*, that the foreman *did* know of such reports to a safety committeeman and was motivated by them, this alone would not make a prima facie case under section 110 of the Act. The scope of the protection afforded by section 110(b)(1)(A) is narrow. *See Munsey v. Smitty Baker Coal Co. Inc.*, 1 IBMA 144 at 154, 79 I.D. 501, 505 (1972), wherein we stated:

> * * * However, the plain language of clause (A) of subsection 110(b)(1) limits the protection to reporting alleged violations or dangers to the Secretary or his authorized representative. *It does not protect the making of general safety protests or the reporting of alleged violations or dangers to fellow employees, supervisors, or the management of the coal mine.* * * * (emphasis added)

We find nothing in the record to support a finding or an inference that Phillips either reported or intended to initiate a reporting process to the Secretary or his authorized representative, or that management in discharging him was

motivated by such belief. We hold, therefore, that Phillips failed to prove entitlement to reinstatement or back wages pursuant to section 110(b) of the Act and that the contrary ruling of the Judge must be reversed.

II

BCOA, as amicus curiae, contends that the Judge erred by refusing to find as controlling the umpire's determination that Phillips was discharged for refusing to work. In support of its contention, BCOA submits that Phillips had contracted to arbitrate his grievance pursuant to the union wage agreement, *supra*, and points out that the arbitrator's ruling was subsequently appealed to the Regional Director of the National Labor Relations Board (NLRB), who refused to assert jurisdiction (ostensibly on the ground that the arbitration proceeding was determinative of the issue). BCOA submits that there are sound policy considerations why the Board should follow the lead of the NLRB and defer to the umpire's decision. We cannot agree with this view.

In reversing the Judge's decision in this case, it so happens that we have reached the same result as that of the umpire, but we did so by virtue of the record before us and not because we were controlled or bound by the umpire's findings and determination. He made his decision pursuant to the arbitration provisions of the union wage agreement and the record presented to him. He expressly stated in his decision that he had "no authority to interpret or enforce the regulations of the Federal [Coal Mine] Health and Safety Act" and declined to rule on the question as to whether the discharge violated any rights granted to the applicant under that Act (Ex. 4(c), p. 10). We may very well consider and weigh the findings of fact of an arbitrator for whatever they may be worth as persuasive in reaching our decision provided such findings are made a part of the record before us, but we are not bound by his decision. Our duty, unlike his, is to rule only on the question of whether

the discharge violates the provisions of section 110(b) of the Act.

As delegates of the Secretary, we are obliged by the mandate of section 110(b)(2) of the Act to: (1) see that an investigation is made of alleged violations of section 110(b)(1); (2) provide an opportunity for a public hearing; and (3) make a decision, independent of other administrative forums, determining the rights of the parties under the provisions of the Act. Should we defer to an umpire's decision made under the National Labor Relations Act of 1947 (NLRA), or an arbitration agreement, as controlling upon us, we would be abdicating the statutory obligations assigned to the Secretary by the Congress. These two public laws (NLRA and the Act) are inherently different, designed to accomplish different objectives, and have been assigned by Congress to different agencies for administration and enforcement. In *NLRB* v. *Pacific Intermountain Express Co.*, 228 F.2d 170, 176 (8th Cir., 1955) the Court said:

> * * * Each fact-finding agency is entitled to make its own decision upon the evidence before it, and the fact that another tribunal has reached a different conclusion upon the same issue arising out of the same transaction does not invalidate any decision which has proper evidentiary support. * * *

BCOA also expresses concern that our Departmental decisions may have the effect of undermining the grievance and arbitration procedures promulgated under the union wage agreement. This is neither the intent of the Act nor of the Board. As we stated in *Munsey, supra,* 1 IBMA at 158 and 79 I.D. 507:

> * * * Section 110 of the Act may not be broadened to provide relief for all unfair or unjust labor practices, and may not be used as a vehicle for resolving grievances which are subject to arbitration under a labor contract or disputes under general labor law.

Although the Board may be influenced by the persuasiveness of an umpire's findings in an arbitration proceeding if, as stated above, it is incorporated into the record of a case before us, we hold that this Board is not bound or controlled thereby in determining the rights of the parties under the Act. We reverse the Administrative Law Judge on the merits of this case, but we find no error committed by him in failing to treat the umpire's decision as binding or controlling upon him.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Order of the Administrative Law Judge, issued June 8, 1972, reinstating applicant, Franklin Phillips, to employment and awarding other damages, IS REVERSED and the application IS DENIED.

BOARD OF MINE OPERATIONS APPEALS

By: /s/ C. E. ROGERS, JR.
C. E. Rogers, Jr., *Chairman*

/s/ DAVID DOANE
David Doane, *Member*

/s/ HOWARD J. SCHELLENBERG, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-623

KENTUCKY CARBON CORPORATION and BITUMINOUS COAL OPERATORS' ASSOCIATION, *Petitioners,*

v.

INTERIOR BOARD OF MINE OPERATIONS APPEALS and FRANKLIN PHILLIPS, *Respondents*

MOTION OF AMERICAN MINING CONGRESS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

American Mining Congress respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consents of the Petitioners and the Solicitor General have been obtained. The consent of the attorney for Respondent Phillips was sought but was refused.

American Mining Congress (AMC) is a national trade association whose membership consists of approximately 500 companies that produce most of the

nation's ferrous and non-ferrous metals, coal, industrial and agricultural minerals, and cement. This includes more than 200 companies that manufacture mining and mineral processing equipment and supplies, as well as financial institutions with a business interest in the mining industries.

As grounds for this Motion, American Mining Congress asserts that the June 20, 1974, split decision of the United States Court of Appeals for the District of Columbia Circuit, made without benefit of oral argument, is not only erroneous in law but will have a substantial adverse impact upon the operations of AMC's members who engage in coal mining and who are subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801, *et seq.* Moreover, the sweeping statutory construction embodied in the Court's decision could bear upon the interpretation of similar anti-discrimination provisions applicable to AMC members subject to the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*, and the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*

Mineral substances and the products derived from them are vital to all segments of our economy and technology and many of them are vital to national security. The decision of the Court of Appeals below, directly and adversely affecting as it does the labor-management relations and ability of AMC members and others to manage their businesses, should be reviewed for these reasons as well as to correct purely legal errors.

While American Mining Congress fully concurs in the arguments advanced by the Kentucky Carbon

Corporation and Bituminous Coal Operators' Association for granting the writ of certiorari sought herein, American Mining Congress believes that the impact of this decision on all mining and minerals producers together with the importance of this industry to the welfare of the United States make it appropriate for this Court, in its consideration of the Petition, to have a full understanding of these issues. The brief *amicus curiae* which American Mining Congress seeks permission to file will, we believe, materially assist the Court in appreciating the full impact of the decision below and the need for its review.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-623

KENTUCKY CARBON CORPORATION and BITUMINOUS COAL OPERATORS' ASSOCIATION, *Petitioners,*

v.

INTERIOR BOARD OF MINE OPERATIONS APPEALS and FRANKLIN PHILLIPS, *Respondents*

BRIEF OF AMERICAN MINING CONGRESS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

American Mining Congress submits this brief *amicus curiae* in support of the Petition filed by Kentucky Carbon Corporation and Bituminous Coal Operators' Association for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case, reported as *Phillips* v. *Interior Board of Mine Operations Appeals,* 500 F.2d 772 (D.C. Cir. 1974).

THE AMICUS AND ITS INTEREST

The importance of mining to the United States cannot be overstated. Mineral substances and the products derived from them form the material basis of our economy and technology. All Americans are totally dependent on these products not only for their standard of living—the highest in the world—but also for their survival, a fact which has become only too familiar in recent times because of the shortage of certain of these materials and their control in some instances by foreign sources.

The significance of mining is apparent from its effect on our economy. Although actual mineral production is slightly less than 3 percent of the gross national product, mining was recently reported to have a direct impact on 40% of the gross national product and an indirect impact on 75% of the gross national product.[1]

American Mining Congress is a national trade association, founded in 1897, whose membership consists of approximately 500 companies that produce most of the nation's ferrous and non-ferrous metals, industrial and agricultural minerals, and cement. This includes more than 200 companies that manufacture mining and mineral processing equipment and supplies, as well as financial institutions with a business interest in the mining industries. The purposes of American Mining Congress are:

a. To foster, promote and develop the general welfare of the mineral industries and all their various branches within the United States;

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[1] See, Statement of Andrew Fletcher, Hearings before the Subcommittee on Minerals, Materials, and Fuels of the Committee on Interior and Insular Affairs, United States Senate, 91st Congress, 1st session, 1969 p. 33.

b. To cooperate with governmen in furthering the national welfare and in developing mining and metallurgy; and

c. To encourage and provide a medium for education in practical and scientific mining and metallurgy; and

d. To encourage and promote, and assist the minerals industry in, the development of the means for detecting, eliminating and preventing the causes of illness and injury among the industry's employees.

As spokesman for the mining industry of the United States, American Mining Congress has a legitimate interest in any governmental or other action which might affect that industry. It is clear that the decision of the United States Court of Appeals for the District of Columbia Circuit in this case presents serious and far reaching implications for members of American Mining Congress. If the judgment below is upheld, it could have direct and disruptive effects on the orderly management of the operations of mining companies, and upon the labor-management relations of those companies, which have particular implications for the national interest.

Each of the member companies of American Mining Congress thus has a substantial interest in the ultimate decision in this case.

ARGUMENT

By a 2 to 1 decision, rendered without the benefit of oral argument, the United States Court of Appeals for the District of Columbia Circuit on June 20, 1974, handed down a ruling that is not only unique in its interpretation of the statute involved, but is far reaching in its implications and impact for labor-manage-

ment relations not only in the coal mining industry, but also in the metal and non-metallic mining industries, and, indeed, industry generally.

1. Viewed in its narrowest sense, the Court below has decided that the "authorized representative of the Secretary" of the Interior for purposes of § 110(b)(1) of the Coal Mine Health and Safety Act, 30 U.S.C. § 820(b)(1), need not be a coal mine inspector and in fact need not even work for the federal government. He can, according to the Court, be simply an employee of the mine. At the very least, the majority's view reflects a very strained interpretation of statutory language which has always been regarded as clear on its face. The majority's reading is likewise inconsistent with existing administrative interpretations.[2] While the Coal Mine Health and Safety Act has never been looked on as the clearest and most precise legislative enactment, the legislative history which does exist strongly compels a conclusion contrary to that reached by the majority of the Court below.[3]

Nowhere in the statute or its history is there authority for the holding that when a safety complaint is made to a mine foreman, that foreman, merely by virtue of receiving the complaint, somehow becomes—in the words of the statute—the "authorized representative" of the Secretary of the Interior; or that the complaining employee thereby "institutes a proceeding" under the Act. Clearly, the interpretation of the Court below has stretched the provision in question out of all recognition and intended meaning merely to satisfy a view of what the law might have said or might have intended.

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[2] See Dissenting Opinion of Judge Robb below, 500 F.2d 772, 783.

[3] *Ibid.*

2. As pointed out by the Petitioners herein, this case not only affects the rights and obligations of more than 140,000 coal miners and the operators of some 2,000 bituminous and anthracite mines in this country, but also affects the rights and obligations of every employee and employer subject to similar provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*, and the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* The decision of the Court below represents far more than a broad and erroneous interpretation of a remedial statute. Its effects could be to shift substantial management prerogatives away from employers, to lay the ground work for the assertion of spurious safety claims as a bargaining device in labor-management disputes, and to permit (indeed to encourage) employees to take unilateral action regarding alleged safety problems under this ruling which they cannot take under their own collective bargaining agreements or under other applicable safety and labor-management laws. In short, American Mining Congress fully concurs in the conclusion reached by Judge Robb in his dissenting opinion below:

> The impact of this decision on mine operations will be substantial. Even more important and significant, in my opinion, is the determination of my colleagues to override a clear and unambiguous statutory provision and substitute the broader protection which they believe miners ought to have as a matter of policy. This is an intrusion into the legislative domain in which I cannot join. 500 F. 2d 772, 788.

CONCLUSION

This case involves issues of great national importance and the petition for writ of certiorari should therefore be granted.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-623

KENTUCKY CARBON CORPORATION and BITUMINOUS COAL OPERATORS' ASSOCIATION - - - - - - - - Petitioners

versus

INTERIOR BOARD OF MINE OPERATIONS APPEALS and FRANKLIN PHILLIPS - - - - - Respondents

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Petition For a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-623

KENTUCKY CARBON CORPORATION and BITUMINOUS COAL OPERATORS' ASSOCIATION - - - - - - *Petitioners*

v.

INTERIOR BOARD OF MINE OPERATIONS APPEALS and FRANKLIN PHILLIPS - - - - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

The Respondent, Franklin Phillips, respectfully states that this brief is in response to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia, respectfully states that said Petition should be overruled.

COUNTERSTATEMENT OF THE CASE

The Respondent, Franklin Phillips, as his counterstatement of the case would like to adopt the concise and lucid statement of the majority opinion of the Court of Appeals for the District of Columbia Circuit. The writer of this brief does not feel that he can improve upon the statement recited therein.

The Respondent would, thereof, like to point out several inadequacies in the statement by the Petitioners. First, the contract between the Union and Company, in existence at the time Respondent was fired, was entered into in 1968, one year prior to the 1969 Coal Mine Health and Safety Act. Obviously, there was nothing in that contract directed at any procedure to effectuate the rights and obligations contained in the 1969 Act. The Union and Company in their November, 1971 contract formalized the procedure by which the members of the Union were to handle safety complaints. As pointed out by the majority opinion of the Court of Appeals, neither the Umpire nor the Regional Director of the NLRB reached the issue of the Respondent's rights under the 1969 Coal Mine Health and Safety Act. The Umpire stated that he had no authority to interpret or enforce the requirements of the Federal Health and Safety Act and declined to rule on Respondent's asserted rights under the Act. The Regional Director, in his refusal to issue a complaint, did not seem to touch high nor low, the issue presented by the Respondent in his complaint to the NLRB. On the refusal of the Regional Director to issue a complaint, and because the Respondent was

without funds to pursue a two-pronged approach to secure his rights under both the NLRB and the Coal Mine Health and Safety Act, upon advice of Counsel that his rights were adequately protected by the Coal Mine Health and Safety Act, a decision was made not to appeal the Regional Director's decision.

REASON WHY THE WRIT SHOULD NOT BE GRANTED

The Court of Appeals was clearly correct in holding that a miner was protected by initiating a complaint of safety violations under the established and conceded practice at this mine by both the union and employer of handling safety violations.

To give Section 10(b)(1) [30 U.S.C. 820(b)(1)] of the Act such narrow construction as urged by the Petitioners would emasculate the clear intent of Congress in protecting the right of miners in making complaints of mine safety violations. In view of the remedial purposes of the Act, these sections must be given a broader and more liberal interpretation than that urged by the Petitioners. The intent of Congress is shown by the Legislative History of the Act, which in part reads as follows:

> Subsection (b) [of the Act] prohibits discrimination against miners for having exercised their rights under this Act *or for having participated, in any way, in the enforcement of the Act.* The subsection provides procedures for obtaining reinstatement and back pay for miners discharged by operators and other remedies for miners discriminated against. (Emphasis added.)

(Legislative History, Federal Coal Mine Health and Safety Act, Committee on Education and Labor, House of Representatives, March 1970, p. 1122.)

The broader and logical intent of the Act is shown in the regulations adopted under Section 110 of the Act. 30 CFR 4.560(b) reads as follows:

> An application for review of an alleged discharge or act of discrimination may be initiated by a miner who believes that he has been discharged or otherwise discriminated against by reason of *invoking his rights*, testifying or awaiting to testify under the Act, or by a representative of miners who believes that he has been discharged or otherwise discriminated against by reason of *invoking his rights* or the rights of the miners he is authorized to represent, testifying or awaiting to testify under the Act. (Emphasis added.)

This matter cannot be characterized as a simple labor dispute as urged by the Petitioners. It is true that the November 1971 contract formalized the procedure for dealing with safety complaints under the 1969 Act. This contract, as in the informal procedure being followed at the mine at the time that the Respondent was fired, recognizes the impracticality of the employee making complaints directly to the Secretary. This contract formalized the procedure in effect at the Ken-Car mine of first processing safety complaints at the mine before "the secretary or his representative" was brought into the picture.

In the instant case, the umpire recognized the Act to give the miner a separate means of relief for such acts of discrimination and he did not attempt to ad-

judicate the Respondent's rights under the Coal Mine Health and Safety Act, nor the scope and application of the Act's protection against discrimination for exercising such rights.

CONCLUSION

The opinion of the Court of Appeals pierces the spurious argument of the Petitioners. As the Court said, "[t]o hold that Phillips was not protected against discharge because he took the first prescribed step under the Ken-Car procedure to invoke the Coal Mine Health and Safety Act, to hold that only a miner's *discharge after* he reaches the Bureau of Mines with his complaint is protected by the Safety Act, would nullify not only the protection against discharge but also the fundamental purpose of the Act to compel safety in the mines" (Opinion of Court of Appeals, p. 18).

For the foregoing reasons, and the reasons well stated in the decision of the Court of Appeals, the Respondent says that the Petition for a Writ of Certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-623

KENTUCKY CARBON CORPORATION AND BITUMINOUS COAL OPERATORS' ASSOCIATION, PETITIONERS

v.

INTERIOR BOARD OF MINE OPERATIONS APPEALS AND FRANKLIN PHILLIPS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Respondent Franklin Phillips, a coal miner, was discharged by petitioner Kentucky Carbon Corporation after his failure to comply with an order to return to work, despite his belief that the working conditions were dangerous. For several months prior to his discharge, Phillips had complained about safety conditions to his foreman and to the Mine Safety Committee. The Committee, which is provided for in the collective bargaining agreement, consists of elected representatives of the miners who are authorized to investigate safety and health conditions and who may close an area of a

mine if imminent danger to the men is threatened. If the mine management refused to correct a hazard, the Committee could report the condition to a Safety Coordinator appointed by the Union who, if necessary, could call a Federal Inspector from the Bureau of Mines and request an inspection (Pet. App. 5a-6a, 39a).

After his discharge, Phillips filed a grievance under the National Bituminous Wage Agreement of 1968, alleging that he had been unjustly discharged. The Board of Arbitration umpire denied the grievance. Phillips then filed a complaint against the mine with the National Labor Relations Board, which was also denied (Pet. App. 8a-10a, 40a).

Phillips then applied to the Secretary of Interior pursuant to Section 110(b)(2) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 820(b)(2), for review of his discharge, alleging that he had been discriminatorily discharged for having complained of unsafe working and health conditions in the mine. The Administrative Law Judge held that Phillips had been discharged in violation of the Act (Pet. App. 11a, 41a-42a). On appeal by the mine, the Interior Board of Mine Operations Appeals (respondent herein) reversed (Pet. App. 37a-47a), finding no support in the record for finding or inferring that Phillips either reported or intended to initiate a reporting process to the Secretary or his authorized representative, or that management's motivation in discharging him was retaliation for such reporting or initiation of the reporting process. The Board ruled that Phillips' complaints to fellow employees, supervisors, or the management of the mine were not sufficient to bring him within the protection of the Section (Pet. App. 43a-44a).

On Phillips' petition for review, the Court of Appeals for the District of Columbia Circuit (in a 2-to-1 decision) reversed the Board and reinstated the order of the Administrative Law Judge (Pet. App. 1a-35a). The court of appeals rejected the Board's narrow construction of the Act, holding that a "liberal construction of the language of the Act is justified" in view of the "wide scope of protection intended" by Congress (Pet. App. 21a). And "given the mine's procedures regarding safety complaints,"[1] the court ruled that "the coverage of the Act begins when the miner notifies his foreman and/or safety committeeman of possible safety violations" and, accordingly, that Phillips' discharge violated the Act (Pet. App. 13a).

Although the government was unsuccessful in the court of appeals, we decided not to file a petition for a writ of certiorari. While we believe that the Board's finding that Phillips was not discharged for filing complaints concerning safety conditions was supported by substan-

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[1]The court described the mine's procedure as follows (Pet. App. 16a-17a):

(1) miner notifies his foreman of the problem and tries to obtain corrective action;

(2) if the foreman disagrees, the miner has the right to call in the Mine Safety Committeeman to evaluate the complaint;

(3)(a) if the Mine Safety Committeeman agrees with the miner and the foreman fails to correct the problem, the Committeeman can bring the case to the entire Committee and they may order the mine section closed;

(3)(b) if the Mine Safety Committeeman disagrees with the miner, the latter can request a Federal Mine Inspector be called in. Pending that determination, the miner is to be temporarily reassigned to another area.

tial evidence, we do not consider that issue appropriate for review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

The court of appeals' construction of Section 110 of the Federal Coal Mine Health and Safety Act presents an issue of importance in the administration of the Act, but at the present time there is no conflict in the circuits. Indeed, so far as we are aware, the issue has arisen only in the District of Columbia Circuit. See *Munsey, et al.* v. *Morton, et al.* (No. 72-2995, decided December 17, 1974, C.A. D.C.). We suggest, therefore, that consideration of this issue by this Court should await further litigation in the courts of appeals.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.